IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

SPECIAL CIVIL APPLICATION No 6669 of 1997

For Approval and Signature:

Hon'ble MR.JUSTICE H.R.SHELAT

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1. Whether Reporters of Local Papers may be allowed to see the judgements? No

2. To be referred to the Reporter or not? No

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3. Whether Their Lordships wish to see the fair copy of the judgement? No

4. Whether this case involves a substantial question of law as to the interpretation of the Constitution of India, 1950 of any Order made thereunder? No

5. Whether it is to be circulated to the Civil Judge? No

RAJA ISMAIL DIWAN - Petitioner

Versus

COMMISSIONER OF POLICE - Opponents

Appearance:

MS DR KACHHAVAH for Petitioner

MR.S.P. DAVE, AGP for Respondents Nos. 1, 2, 3

CORAM : MR.JUSTICE H.R.SHELAT

Date of decision: 25/11/97

ORAL JUDGEMENT

1. By this application under Article 226 of the Constitution of India, the petitioner calls in question the legality and validity of the detention order, passed by the Police Commissioner of Surat City on 13th May,

1997 invoking the powers under Section 3(2) of the Gujarat Prevention of Anti Social Activities Act, 1985 (hereinafter referred to as `the Act'). Pursuant to that order, the petitioner was arrested and at present he is under detention. The facts which led the petitioner to prefer this application may in brief be stated.

2. The police of Surat City had the information that the petitioner was running distillery and tippling houses at different places. Not only that, he was supplying the liquor and selling the same to different sections of the society, with the result several problems qua public health arose. Hooch tragedies also came to light leading to massacre. Whenever on the basis of the information, which was kept secret, the premises of the petitioner was raided, liquor in huge quantity was found by the Salabatpura Police Station. Three complaints came to be registered. What transpires from the first complaint is that when on 24th May 1996, the premises were raided, 125 liters of country made liquor was found. As alleged in the second complaint when the premises were raided on 26th May, 1996, 103 liters of liquor was found and as averred in the third complaint when the premises of the petitioner were raided on 1st June, 1996, 117 liters of liquor was found. It was also noticed by the police that the petitioner in order to carry out his such activities, sought support of different people by demanding their vehicles or forcibly causing them to permit to use their premises. He used to beat or extort money or loot, or committed other criminal wrongs. Those who refused to bend his way, were met with dire consequences. No one was daring to come forward to make any statement or take any action because the people had cultivated the fears of violence, and feeling of insecurity because of the impending danger to their lives. Despite the assurance of due protection, no one was ready to state and provide necessary information to the police. Some of the persons showed willingness only after the assurance that the facts unveiling their identity will be kept secret or under wraps, and that is how the police could record certain statements of the witnesses wherein also the police found that because of petitioner's horrible activities, atrocities and fear of violence, no one was happy and everyone under mental stress and to eschew ill-omened happening preferred to keep his lips tight. After recording the statements, after inquisition, the police found that aforesaid and other anti social activities, endangering the public health and public order were going berserk. To curb the same, strict remedial measures were necessary. As the activities were insurmountable because any actions under the general

laws, sounding dull was nothing but the futile exercise and meaningless, it was thought wise to heavily come down upon the petitioner for which the only way to curb the activities of the petitioner out was to pass the detention order and detain him in custody. Consequent upon which the order in question came to be passed, and the petitioner was then arrested. By this application the legality and validity of that order is challenged.

3. The petitioner has challenged the order on several grounds but, it is not necessary to deal with all those grounds and to answer the same because only on one ground going to the root of the case, the application can be disposed of finally. The parties also do not press for the finding on all other grounds. I will, therefore, confine to the only ground going to the root of the case.

4. According to the petitioner, there was no justification to exercise the privilege under Section 9(2) of the Act. The authority ought to have furnished the particulars of the witnesses because the disclosure of which was not in any way against the public interest. The learned AGP Mr.Dave has submitted that the privilege is exercised keeping safety of the witnesses in mind. The authority did not wish to put the witnesses to perilous situation, and so the particulars making any one to know who gave statement were not furnished. In other words the particulars unwrapping the identity of the witnesses were withheld and therefore he urged the court not to find fault with the said non-disclousre.

5. It would be better if the law about the non-disclosure of certain facts is elucidated. Reading Article 22(5) of the Constitution of India, what becomes clear is that the grounds on which order of detention has been made are required to be communicated to the detenu and further an opportunity of making the representation against the order of detention is required to be given. The detenu is therefore required to be informed not merely factual inference and factual material which led to inference namely not to disclose certain facts, but also the sources from which the factual material is gathered. The disclosure of sources would enable the detenu to draw the attention of the detaining authority in the course of his representation to the fact whether the factual material collected from such sources would be relied upon and used against him on the facts and circumstances of the case. Subject to the limitation mentioned in Article 22(6) of the Constitution of India and Section 9(2) of the Act the detaining authority is empowered to withhold such facts and particulars, the

disclosure of which he considers to be against the public interest. The privilege of non-disclosure has to be exercised sparingly and in those cases where public interest dictating nondisclosure overrides the public interest requiring disclosure. Hence the detaining authority must be fully satisfied on the basis of overall study that the apprehension expressed by the informant is honest, genuine and reasonable in the circumstances of the case. With a view to satisfy itself whether the fear of violence and consequential feelings of insecurity or apprehension of a wrong would be done to them at any time by the detenu by those making statement against the detenu is imaginary or fanciful; or an empty excuse or well founded for disclosing or not disclosing certain facts or particulars of those persons the authority making the order has to make necessary inquiry personally. What can be deduced from such Constitutional as well as legal scheme whereunder obligation to furnish the grounds and the duty to consider whether disclosure of any facts involved therein is against public interest or both vested in the detaining authority and not in any other. The authority passing the order of detention has to apply his mind and should itself be satisfied to the question whether or not the supply of the relevant particulars and materials would be injurious to the public interest. If he mechanically endorses or accepts the recommendation of an outsider or inferior authority in that behalf the exercise of power would be vitiated as arbitrary. What is further required is the detaining authority must file his affidavit to satisfy the court that he had sincerely and honestly applied the mind for the bona fide exercise of the powers about disclosure and privilege regarding non-disclosure so that the court can examine rational connection between the ground disclosed or not disclosed in public interest. If no affidavit explaining the exercise of the power is filed the court can infer against the detaining authority. If the affidavit is filed explaining the exercise of the power the other side may challenge the privilege exercised on the ground that the same is vitiated by factual or legal mala fides. For my such view, a reference to a decision in the case of Bai Amina, W/o Ibrahim Abdul Rahim Alla v. State of Gujarat and Others - 22 G.L.R. 1186 held to be the good law by the Full Bench of this court in the case of Chandrakant N. Patel v. State of Gujarat & Others 35(1) [(1994 (1)] G.L.R. 761. may be made.

6. In view of such law made clear in above case the authority passing the detention order is under an obligation to furnish the material facts and particulars. But it is his duty to consider whether the disclosure of

any facts involved therein is against public interest or against the interest of the witnesses giving the statement. When the privilege to withhold facts and particulars is exercised by the authority after being personally satisfied, it is then not open to the detenu to contend that in the absence of such facts and particulars, he is not in a position to make any effective representation. Reading the order in question, the copy of which is produced at page 12, it is abundantly clear that the authority passing the detention order got himself satisfied assigning the task of inquiry thereof to his subordinate. He has not personally satisfied himself for exercising the privilege not to disclose certain particulars. It is submitted by the learned AGP Mr. Dave that the copy of the order produced at page 12 shows that the authority was fully satisfied before passing the order and that would indicate that the authority was also satisfied for the exercise of the power and withholding the particulars. The contention cannot be accepted. Reading the order at page 12, what can be deduced is that the authority was fully satisfied for passing the order of detention and not for exercising the privilege granted vide Section 9(2) of the Act. About the same he has specifically and separately made necessary mention in the order produced at Exhibit 11 which I have hereinabove referred to, and that shows that there is no personal satisfaction. The contention therefore does not gain a ground to stand upon.

7. The detaining authority has not filed his affidavit justifying the exercise of privilege and satisfy the court about his personal satisfaction.

8. When the case about exercise of the privilege is not made out, it was incumbent upon the authority passing the order to supply all those particulars to the petitioner so that the petitioner could make effective representation but when all those particulars are not supplied, without any just cause, the petitioner's right to make effective representation was marred. When that is so, the order in question is not legal and valid and continuous detention is illegal. The detention order therefore is required to be quashed.

9. For the aforesaid reasons, the order of detention dated 13th May, 1997 is hereby quashed and the petitioner is ordered to be set at liberty forthwith if no longer required in any other case. Rule is accordingly made absolute.

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